U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 January 2007

BALCA Case No.: 2005-INA-00161
ETA Case No.: P2000-TX-06328468

In the Matter of:

MILAM DEVELOPMENT, INC.,
Employer,

on behalf of

GHANIM AL-KAZZAZ,[1]
Alien.

Appearance: Yanpin Yang Esquire
Law Offices of Adan G. Vega & Associates, PLLC
Houston, Texas
For the Employer and the Alien

Certifying Officer: Jenny Elser
Dallas, Texas

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification in the above-captioned matter. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the

[1] The Alien's last name is spelled "al–Qazzaz" on some documentation in the Appeal File ("AF") (*see, e.g.*, AF 195, 200); however, in most references his name is spelled "Al-Kazzaz."

Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[2]

STATEMENT OF THE CASE

On February 25, 2000, Milam Development, Inc. ("the Employer" or "the Petitioner"), a real estate development company, filed an application for labor certification to enable the Alien to fill the position of "Project Manager." (AF 224, 230).[3] The Employer requested a reduction in recruitment ("RIR"). (AF 223). The State Workforce Agency (SWA) reported that the Employer was advised that it was unlikely that its RIR would be approved because the Employer's wage offer did not meet the prevailing wage, and directed that the Employer re-post the job with a corrected wage. The SWA also directed that the Employer submit its tax account number. (AF 218-222). In a September 16, 2002 letter the Employer's original representative stated that the Employer agreed to the prevailing wage determination and had re-posted the job offer. In regard to the tax account number, the attorney wrote:

> In connection with the … tax account number, you should know that there has not been one issued yet. It has been requested, but not issued.
>
> The employer has never paid wages. It is not that they can't; but they have always paid people on a contract basis. They have used contractors and subcontractors. The beneficiary and about 25 others have worked as a contractors [sic] and been paid on that basis.

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[3] The application was filed and processed under the name of Milam Development, Inc. as the petitioning Employer. We observe that on the ETA 750B the Alien listed his current employment under an H-1B visa as for Asset Associates. (AF 227). On a G-28 submitted on August 30, 2001 by the Employer's original representative in response to a request from the CO, Asset Associates is listed as the petitioning Employer, with attention directed to a person with the same last name as the Alien. (AF 208; *compare* AF 229 – G-28 from the same attorney showing Milam Development as the petitioner). However, all other references to the petitioning Employer in the record are to Milam Development. Thus, it is unclear whether there is a relationship between Milam Development and Asset Associates.

(AF 217). On December 4, 2000, the SWA forwarded the application to the federal CO with the recommendation that the RIR be granted. (AF 209-210).

On July 31, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification because there did not appear to be a *bona fide* job opening.[4] (AF 39-42). The CO pointed out that the Employer's counsel had stated that the Employer "does not have a payroll; they have no employees." (*see* AF 41 and AF 44). The CO observed that the documentation submitted by the Employer included copies of IRS 1099 forms used specifically for contract labor. Because it appeared that the Employer did not have any employees and its entire labor force was contract labor, the CO concluded that it was not possible to determine that the job offer was clearly open to qualified U.S. workers. The Employer was advised it could rebut this finding by establishing that an employer-employee relationship exists and that the Employer is actually offering a *bona fide* job to which U.S. workers could be referred for permanent full-time work.

The Employer submitted rebuttal which was received on September 8, 2003. (AF 7-38). At this time, new counsel entered an appearance on behalf of the Employer and the Alien. (AF 7-8). The Employer contended that it met the regulatory definition of "employer" and that its job offer met the regulatory definition of "employment." Specifically, the Employer asserted that it was established in 1998, is a properly registered and ongoing business and has a business location in Houston, Texas to which workers can be referred. The Employer argued that it has also met the requirement of establishing a permanent and full-time employment opportunity, inasmuch as it has proposed a permanent and full-time job offer to the alien beneficiary at a stated salary and with job duties which are full-time. The Employer stated that its job offer met the regulatory mandates, being open to any qualified U.S. worker. The Employer asserted that it did have one employee on its payroll, attaching print-outs of pay stubs for an individual who was employed by it in 2003 during the month of August. The Employer contended that the fact that it had not had any payroll employees in the past did not prevent it from offering a *bona fide* position to the alien beneficiary. Referencing criteria utilized by the Internal Revenue Service

[4] The issue of the prevailing wage, while raised in the NOF, was successfully rebutted and will not be detailed herein.

("IRS") for determining whether work is on a employee or contract basis, the Employer contended that it was proper to classify the job offer as a position for an employee, as it was for the IRS and not the Department of Labor to assign and classify the status of a worker as an employee or a contractor. According to the Employer's attorney, the position at issue was an integral part of the Employer's daily operations which, based on IRS criteria, would indicate an employer-employee relationship. The Employer argued that the fact that it had classified its entire labor force as contract labor was not an indicator or a determining factor for the IRS to determine whether a worker was an employee or an independent contractor. The Employer's attorney contended that the Employer had been outsourcing its project management to one contractor for several years and had decided to internalize the project management for economic reasons, and had therefore offered the position to the Alien beneficiary. According to the Employer's attorney, the Alien could not be placed on payroll until a proper visa was obtained.

On January 3, 2005, the CO issued a Final Determination denying certification. (AF 4). The CO concluded that the Employer had no employees other than contract labor and had failed to document the existence of a *bona fide* job offer.

On January 28, 2005, the Employer filed a Request for Review of a Denial of Certification. (AF 1). In its request for review, the Employer argued that it provided evidence to show that it was a *bona fide* U.S. entity, and that the fact that it had been hiring contractors did not prevent it from hiring a payroll employee now or in the future. The Employer argued that it had provided a list of contractors it has hired during the past few years and demonstrated that the contractors were performing different job duties than those to be performed by the Alien beneficiary, the latter being a position that includes more control and supervision from the Employer. According to the Employer, the CO failed to discuss its arguments regarding the IRS guidelines, the Employer's internalization of jobs which made the instant job opening possible and the argument that the Alien beneficiary does not have to work for the Employer while the labor certification application is in process in order for the position to be *bona fide*. The Employer urged that the CO's insistence on the actual employer-employee relationship is misplaced and not warranted by law.

On appeal, the Employer submitted a Legal Brief reiterating the arguments made in its request for review, further arguing that in the Final Determination the CO failed to discuss or explain whether or not the evidence submitted in rebuttal satisfied the regulatory requirement of a *bona fide* "employer and employment" relationship. The Employer contended that it met its burden of establishing that it was an employer and that it was offering a position which was permanent and full-time. The fact that the Employer has not had employees in the past, but only contractors, should not prevent it from internalizing contractor jobs and offering employee positions now. The Employer relied on the IRS guidelines for defining employer-contractor relationships to contend that whether a job offered is one for an employee or an independent contractor is based on the facts of each case, not on the employer's arbitrary assignment.

DISCUSSION

The requirement of a *bona fide* job opportunity arises out of 20 C.F.R. § 656.20(c)(8), which states that an employer must clearly show that the "job opportunity has been and is clearly open to any qualified U.S. worker." An employer bears the burden of proving that a *bona fide* job opportunity exists and is open to U.S. workers. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc). "When applying the totality of the circumstances test, it may be helpful to think first in terms of the factual circumstances surrounding the application, and second, what those circumstances have to say about the *bona fides* of the position." *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc). Where the factual circumstances reveal the employer's intention to hire the Alien as its only employees with all other workers considered to be contractors, the question arises of whether the position is possibly being used to promote immigration rather *bona fide* employment. *Eastlake Pools & Landscape Inc.*, 2003-INA-276 and 277 (Sept. 13, 2004). Thus, a CO reasonably may inquire into the *bona fides* of a job offer where the employer is sponsoring a permanent alien labor certification application for a position that had previously been filed by an independent contractor. *See Al-Or International, Ltd.*, 1994-INA-427 (Jan. 17, 1996).

Simply put, this case involves a real estate development company that wants to create a full-time job as an internal employee for a Project Manager, while apparently retaining its prior practice of treating all other labor as "independent contractors." Given this circumstance, the CO reasonably inquired into whether the Employer would be providing *bona fide* employment open to any qualified U.S. worker. The issue is, therefore, whether the Employer has credibly established that it will now convert the Project Manager position to *bona fide*, full-time employment. We agree with the CO that the Employer did not provide convincing documentation to explain why it is now offering a *bona fide* job opportunity clearly open to U.S. workers.

Upon review of the Appeal File, we find that Milam Development, Inc. is a substantial business enterprise with sufficient resources to engage workers. It is also clear that its business model has been to use contract labor rather hire employees.[5] The issue, thus, is not whether the petitioning Employer is a *bona fide* business; we find that it clearly is. Rather, the issue is whether the Petitioner is offering *bona fide* employment for a Project Manager, or whether the position was created merely to facilitate the Alien's immigration status.

It may not be unusual for a real estate development company to engage a project manager as an employee to coordinate contractors, subcontractors, and overall project execution. However, the Appeal File in this case establishes that the Petitioner engaged the Alien in the past and during the labor certification application processing period in the role of project manager on a contract basis rather than as its own employee. (*see, e.g.*, IRS form 1099s at AF 68, 71; Attorney's statement at AF 217 indicating that the Alien and 25 others had always been employed in the past on a contract basis; letter signed by the Alien at AF 21 on August 12, 2003, indicating that he was doing communicating with a bank about a development project on behalf of the Employer; the Employer's list of contractors at AF 37, showing that the Alien was a

[5] We acknowledge that there is evidence that the Petitioner paid one worker as an employee in August 2003. (AF 27-28). However, there is no documentation explaining what type of work this employee did or whether it lasted more than this single month. The great preponderance of the evidence in the Appeal File establishes that, except for this one isolated instance, the Employer has always engaged contract workers for its labor and service worker needs.

Project Manager from 2000 to 2001).[6] Thus, the Petitioner's labor certification application begs the question of what changed to cause it to alter its business model for this one job function.[7]

The Appeal File contains no evidence from the Employer itself that directly addresses this question. In the rebuttal, petition for review and appellate brief, the Employer's attorney argued that the Employer had decided to internalize project management for economic reasons, and had therefore offered the Project Manager position to the alien beneficiary. No details, however, were provided as to what those economic reasons might be. Similarly, the Employer's attorney argued in the request for review that the project manager position was demonstrated to be different from other contract services engaged by the Employer, and that the Project Manager position will involve more control and supervision from the Employer. We can see from the list of contractors at AF 37 that most of the contract services involved discrete jobs, such as landscaping, sheetrock installation, electrical wiring, and so forth. However, the Appeal File makes it clear that the Employer has been using contractors for project management for years. The Appeal File does not contain a statement detailing what new control and supervision over the project management this position will entail. Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting evidence is insufficient to carry the Employer's burden of proof. *See Gencorp,* 1987-INA-659 (Jan. 13, 1988) (en banc). Moreover, statements of counsel in a brief or otherwise presented, unsupported by underlying party or non-party witness documented assertions do not constitute evidence, and

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[6] The Employer's Partnership Return of Income shows that in the years 1999, 2000 and 2001, no salaries or wages were paid. (AF 45-55). The ETA 750B lists the Alien as being employed by Asset Associates from 1998 to present, his status being "self-employed" as an independent contractor. (AF 227). The Employer has submitted numerous 1099 MISC forms, however, and those documents reveal that in 2001, the Alien earned $40,750.00 from Employer in "nonemployee compensation." (AF 68). Asset Associates earned $72,520.00 in that year. (AF 69). In 2000, the Alien earned $19,000.00, while Asset Associates earned $104,032.80. (AF 79). In 1999, Asset Associates earned $103,000.00. (AF 82). No 1099 for the Alien was submitted for that year.

[7] Because the Alien indicated that he was working at Asset Associates at the time of the labor certification application in January 2000, it appears that he shortly thereafter began working for the Petitioner as a Project Manager on a contract basis. The Employer's attorney indicated that the reason the Alien was being paid on a contract basis is that the Petitioner could not put the Alien on a payroll as an employee until labor certification is granted. This is a dubious argument given that H-1B visas are portable upon the filing of a petition with USCIS. *See* USCIS, *Adjudicator's Field Manual - Redacted Public Version, Chapter 20 Immigrants in General* § 20.2(c) (Nov. 2006). Moreover, if the Petitioner was not eligible to petition USCIS under the H-1B portability provisions, it does not assist its credibility on the bona fide job opportunity issue as it would then appear that it engaged the Alien as an "independent contractor" knowing that he was out of status.

are not entitled to evidentiary value, except that an attorney may be competent to testify about matters of which he or she has first-hand knowledge. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc); *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (en banc).

The Employer relied heavily on the contention that the job it describes in the labor certification application would meet IRS guidelines for defining work that is performed as an employee rather than on contract basis, and insisted that these guidelines are binding on the Department of Labor when considering the labor certification application. The Employer, however, cited no authority for the proposition that these IRS guidelines are binding on DOL in labor certification applications. Even if the guidelines are applicable, they do not explain why the Employer chose to convert its practice from using a contracted project manager to using an in-house project manager, if not solely for the purpose of assisting the Alien in obtaining permanent residency. We find that the Employer did not establish that it was presenting a *bona fide* job opportunity clearly open to U.S. workers.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. A remand, however, is not required where the application is so fundamentally flawed that a remand would be pointless, such as here, where the Employer failed to document that a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's Final Determination denying labor certification is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.